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SUPREME COURT U.S.

No. 82 6370

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BENITO MARRERO,

Petitioner,

V.

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts erred in denying habeas relief, in that the imposition by the Florida trial court of maximum consecutive sentences totaling two hundred and forty (240) years constituted cruel and unusual punishment in violation of the provisions of the Eighth Amendment to the United States Constitution.

2. Whether the lower courts erred in denying habeas relief without holding an evidentiary hearing or making an independent determination of the voluntariness of Petitioner's confessions, in view of Petitioner's contention that he made inculpatory statements due to promises and while under the influence of a drug habit.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No._____

BENITO MARRERO,

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v.

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, BENITO MARRERO, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on October 7, 1982.

OPINION BELOW

The Court of Appeals, on October 7, 1982, entered its decision affirming the denial of Petitioner's petition for writ of habeas corpus filed under Title 28 U.S.C. §2554. A copy of the decision is attached hereto as Appendix A.

The Court denied Petitioner's Petition for Rehearing on December 13, 1982. A copy of the Order is attached as Appendix B.

JURISDICTION

On October 7, 1982, the Court of Appeals entered judgment affirming the denial of the Petitioner's Petition for Writ of Habeas Corpus under Title 28 U.S.C. §2254. (App. A). The Circuit Court denied rehearing on December 13, 1982. (App. B). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). 1/

1/ No other petitioner is involved in this petition.

CONSTITUTIONAL PROVISION INVOLVED

1. United States Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. United States Constitution, Amendment V:

> ...(n)or shall be compelled in any criminal case to be a witness against himself... .

STATEMENT OF THE CASE

Petitioner was convicted in the Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida of twelve (12) counts of breaking and entering and twelve (12) counts of burglary, all involving the rooms of a single motel. Twenty-four (24) judgments and sentences were imposed for a total of two hundred forty (240) years. (Copies are attached hereto collectively as Appendix C). Before the trial, there was held a Motion to Suppress hearing in which Petitioner argued that certain incriminating statements he had made were involuntarily given due to promises the authorities had made to him. (Appendix D at pages 33-34). The trial judge held that the statements had been voluntarily given. (Appendix D at page 35). Petitioner filed a Motion to Reduce Sentence, which was denied by the trial judge. Copies of the Motion and Minutes of the denial thereof are attached hereto as collective Appendix E.

Petitioner appealed his judgment and sentence to the District Court of Appeals, Second District, State of Florida, inter alia, on the following grounds:

A. The Court erred in allowing into evidence a portion of a statement allegedly made by the Appellant to the effect that he sold televisions for money and dope.

B. The Court erred in denying the Appellant's Motion to Reduce Sentence.

The District Court of Appeals, Second District, State of Florida, per curiam, affirmed the judgment and sentence of the trial court on October 8, 1976. A copy of the court's decision is attached hereto as Appendix F. Excerpts from the Brief of Appellant, attached as Appendix G, present the Constitutional questions relied upon at page G-1.

On September 4, 1979, Petitioner filed a Motion pursuant to Fla. R. Crim. P. 3.850 to vacate, set aside or correct the sentence. A copy of this Motion is attached hereto as Appendix H. An order denying the Motion was entered on September 20, 1979. A copy of the Order is attached hereto as Appendix I. Petitioner appealed the denial of his Motion to the District Court of Appeals, Second District, State of Florida and that Court affirmed on December 21, 1979. A copy of the

District Court's opinion is attached as Appendix J.

Petitioner thereafter filed in the District Court of Appeals for the Middle District of Florida a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. A copy of the Magistrate's Report and Recommendation, dated October 27, 1980, is attached as Appendix K. It is to be noted that the Magistrate's Report and Recommendation was the only substantive opinion rendered during the process of this appeal. In an Order dated July 9, 1981, United States District Judge William Terrell Hodges adopted the reasoning of the Magistrate's Report and Recommendations, and ordered that the Petition for Writ of Habeas Corpus be denied. A copy of the Order of Judge Hodges' is attached hereto as Appendix L.

REASONS FOR GRANTING THE WRIT

1. Cruel and Unusual Punishment (Eighth Amendment Issue):

The decision below presents significant questions of the meaning and efficacy of the prohibition of the Eighth Amendment to the United States Constitution against cruel and unusual punishment, to include the principle that punishment meted out may not be disproportionate to the crime. The Supreme Court of the United States in Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 432, 63 L.Ed.2d 715 (1980) held that the proportionality principle in most cases will not be employed but in a footnote added that a proportionality principle could come into play in an "extreme example" such as punishing overtime parking with life imprisonment. See id., 445 U.S. at 274 n. 11, 100 S.Ct. at 1139 n. 11, 63 L.Ed.2d at 391 n. 11. See also the dissent in Hutto v. Davis, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982). The United States Circuit Court of Appeals for the Eighth Circuit has recognized that the proportionality principle is applicable to cases which do not involve the death penalty, as in a life sentence without possibility of parole. Helm v. Solem, 684 F.2d 582 (8th Cir. 1982).

Here, Petitioner was convicted of twelve (12) counts of breaking and entering and of twelve (12) counts of grand theft for which twenty-four (24) maximum consecutive sentences, totaling two hundred forty (240) years, were imposed. The offenses involved the theft of television sets from the rooms of a single motel, and involved no violence toward another person. These were certainly extraordinary circumstances and, it is submitted, the sentences represent an "extreme example" of punishment disproportionate to the crime and were cruel and unusual within the meaning of the Eighth Amendment.

2. Involuntary statements (Fifth Amendment Issue):

At no point in the habeas proceedings was there made, by the United States District Court or by the United States Court of Appeals, an independent determination of whether or not Petitioner's inculpatory statements were voluntarily or involuntarily made. When there is made such a claim, it is the duty of the appellate court to examine the entire record and make an independent determination of the ultimate issue of voluntariness. Beckwith v. United States, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976); Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966).

Petitioner was not afforded an evidentiary hearing in the United States District Court for the Middle District of Florida, and neither the District Court nor the Circuit Court of Appeals made an independent determination or comment as to the voluntariness, or lack thereof, of Petitioner's inculpatory statements. The Motion to suppress hearing at the State Court level (Appendix D) was certainly not conclusive of the issue of the voluntariness of Petitioner's inculpatory statements.

CONCLUSION

For the foregoing reasons, Petitioner, BENITO MARRERO, respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

Donald S. Cambas

DATED: 9 March, 1983

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APPENDIX

Appendix A through Appendix L-2

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 81-6038

D.C. Docket No. 80-114-CIV-T-H

BENITO MARRERO,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

Before VANCE and ANDERSON, Circuit Judges, and JONES, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, AFFIRMED.

October 7, 1982

ISSUED AS MANDATE:

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

US COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
DEC 13 1982
Norman E. Zoller
Clerk

No. 81-6038

BENITO MARRERO,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT,

Respondent-Appellee.

Appeal from the United States District Court for the
Middle District of Florida

ON PETITION FOR REHEARING

(DEC 13 1982)

Before JONES, VANCE and ANDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied

ENTERED FOR THE COURT:

United States Circuit Judge

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APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BENITO MARRERO, :

Petitioner :

vs. : No. 80-114 Civ.T-H

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida, :

Respondent :

REPORT AND RECOMMENDATION

This cause came on for consideration upon the filing of a petition for writ of habeas corpus by Petitioner, BENITO MARRERO, pro se, in forma pauperis. Petitioner is currently incarcerated and serving a term after state court conviction for twelve counts of breaking and entering, and twelve counts of grand larceny.

In support of his petition for habeas corpus relief, Petitioner alleges the following grounds:

1) that the consecutive sentences imposed by the trial court on each of twenty-four separate sentences and judgments, constitute cruel and unusual punishment;

2) that the admission of Petitioner's custodial statement was in violation of his Fifth Amendment right against self-incrimination;

3) that Petitioner was denied due process and equal protection because he was tried and sentenced under a statute that was amended prior to his trial.

Two recent United States Supreme Court cases have addressed the questions of cruel and unusual punishment and consecutive sentencing. In Rummel v. Estelle, ____US _____, 100 S. Ct.____, 63 L. Ed. 2d 382 (1980), the Court rejected the Petitioner's arguments that the sentence imposed was cruel and unusual because of its disproportionality to the crime and the absence of violence in the crimes committed. The Court went on

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to indicate that the length of a sentence for a particular felony offense was a matter of legislative prerogative.

In a second recent case, the Supreme Court also indicated that a sentence is not cruel or unusual merely because the sentencing court has chosen to impose consecutive sentences. Whalen v. United States, __ US ___, 100 S. Ct. ___, 63 L. Ed. 2d 715 (1980). Again, as in Rummel, supra, the Court indicated that the issue of consecutive sentencing is also a matter of legislative prerogative.

Subsequent to Rummel, supra, the Fifth Circuit Court of Appeals [Terrebonne v. Blackburn, no. 79-1680, opinion of August 29, 1980], held that a punishment is only unconstitutionally excessive if it makes no measurable contributions to acceptable goals of punishment or is grossly out of proportion to the severity of the crime involved. The court indicated that in determining whether a sentence was so disproportional to the crime as to constitute cruel and unusual punishment, it was obligated to consider the potential means by which the accused's sentence could be reduced to lesser terms, such as by good time credits and parole. Additionally, the court determined that in a situation in which it was faced with an attack on the sentence imposed as being disproportionate to the particular offense, the court had the obligation to determine the graduations of culpability that may exist within the scope of the conduct proscribed by the statute.

The fifteen year sentence imposed upon Petitioner for each of the twelve counts of breaking and entering and each of the twelve counts of grand larceny falls within the statutory penalty provided by Florida Statutes §810.02, and as indicated in Rummel, is a matter of legislative prerogative. Florida Statutes §921.16 provides statutory authority for a court to impose consecutive sentences. Whalen, supra, teaches that the issue of consecutive sentencing is also a matter of legislative prerogative. Even in light of the criteria recognized by the court in Terrebonne, supra, the sentence imposed upon Petitioner

in this case withstands attack as being cruel and unusual punishment.

Petitioner's second ground in support of his petition for habeas corpus relief is that the admission of his custodial statement was in violation of his Fifth Amendment right against self-incrimination. Prior to his state court trial, Petitioner filed a Motion to Suppress which questioned confessions and admissions made by Petitioner. A review of the record in this case indicates that the factual dispute concerning the voluntariness of Petitioner's confession was fully and fairly presented at the state court hearing, and that the state's determination that Petitioner's confession was not violative of his Fifth Amendment rights is supported by the record as a whole. Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963). Therefore, it is not necessary for this Court to redetermine this issue.

As his third ground in support of his petition for habeas corpus relief, Petitioner alleges that he was denied due process and equal protection because he was tried and sentenced under a statute that was amended prior to his trial. Petitioner was charged and convicted under Florida Statutes §810.02 (1973). All of the offenses committed by Petitioner occurred prior to October 1, 1975, the date on which the revised statute took effect. The Supreme Court of Florida has upheld the validity of a sentence imposed pursuant to the terms of a statute as it read at the time the offense was committed, rather than pursuant to the terms of the statute as it had been revised prior to the defendant's trial. Castle v. State, 320 So. 2d 10 (Fla. 1976). Additionally, the Fifth Circuit Court of Appeals has indicated that a state court's adverse ruling concerning a defendant's right to invoke the benefits of a revised statute does not raise the claim to federal constitutional proportion. Colvin v. Estelle, 506 F. 2d 747 (5th Cir. 1975. There is therefore nothing in the third

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ground which states a claim upon which relief might be granted by this Court.

Accordingly, I recommend that the petition be denied.

This 27th day of October, 1980, at Tampa, Florida.

PAUL GAME, JR.
UNITED STATES MAGISTRATE

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BENITO MARRERO, #021775,

Petitioner,

-vs-

LOUIE L. WAINWRIGHT, et al.,

Respondents.

CASE NO. 80-114 Civ-T-H

ORDER

Before the Court is a prisoner's petition for writ of habeas corpus. The Petitioner was convicted by a jury of twelve (12) separate counts of breaking and entering, and twelve separate counts of grand larceny. The twenty-four counts were contained in three separate informations. Petitioner was found guilty on each count and sentenced for a total of 240 years. Petitioner broke into twelve separate motel rooms, with each room having its own separate key. A charge of breaking and entering carried a maximum penalty of 15 years, and grand larceny carried a maximum penalty of 5 years. Petitioner was given the maximum sentence on each conviction. The sentences were within the statutory limit.

Petitioner first contends that the sentence is disproportionate to the crime, thus constituting cruel and unusual punishment. Petitioner contends as well that the imposition of consecutive sentences in this case constitutes cruel and unusual punishment.

Petitioner's second contention concerns the trial court's denial of Petitioner's motion to suppress illegally obtained

APPENDIX L-1

admissions and/or confessions. Petitioner claims that the admission of his custodial statement was in violation of his fifth amendment right against self incrimination.

Petitioner's final contention is that he was denied equal protection and due process because he was tried and convicted under a statute that was amended prior to trial.

This matter was considered by the Magistrate, who has filed his report recommending that the petition be denied. Upon consideration of the Magistrate's report and recommendation and this Court's independent examination of the file, it is ORDERED that the petition for writ of habeas corpus be DENIED.

DONE and ORDERED at Tampa, Florida, this 9th day of July, 1981.

UNITED STATES DISTRICT JUDGE

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